IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 252

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner,*

v.

FLORENCE C. FINN, *Respondent*

ANSWER BRIEF FOR RESPONDENT

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SUBJECT INDEX

LIST OF AUTHORITIES

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Statement

We can see nothing gained for us, the Court or Petitioner by re-stating all that has gone before in this case. I feel sure that the Court will understand the gist of the matter in controversy, suffice, we believe, to tell this Court that we stand right on the principles laid down by the Court of Appeals, for the Fifth District, in its Opinion rendered on

May 17, 1950 (FEDERAL REPORTER, Second Series, page 845). The Opinion of The Court was written by Holmes, Circuit Judge.

And may we cite; The Memorandum of the United States District Court Denying Defendant's Motion to Remand (R. 179), HONORABLE T. M. KENNERLY, Judge, went into the questions presented to that Court, which are about the same contentions here presented by Petitioner, and made his ruling thereon, which we refer to as an Opinion of the Court, and, JUDGE KENNERLY held against petitioners and explained to them why he was holding against their Motion to Remand and quoted from their said Motion what they had submitted to the Court (R. 176-180). I believe that this Court will read those two opinions, and if it does, they will tell it more about our position and argument than we would be able to do if we tried to restate it all and present our argument thereon; for we adopt the opinion of those two able Judges as the position we take here and now. Petitioners have cited many cases to the Court purporting to be parallel to ours, but none are.

May I remind the Court about the provision in 28 U.S.C. 1441, Act June 25, 1948, C. 646, Sec. 39, 62 Stat. 992, effective September 1, 1948, under which there has been but one case decided, and that is the case of BENTLEY v. HALLIBURTON OIL WELL CEMENTING COMPANY, 174 Fed. (2d) 788. This being a new law there can not be more than that one.

The HALLIBURTON case is not comparable to ours, the situations and the case are entirely different from ours. In the instant case you will find the pleadings of plaintiff that were filed by her in the State Court and were the trial pleadings in (Tr. 6). If the Court will read our pleading it will find it different, I believe, from what petitioners

tell you it is, and just like the United States Court of Appeals, for the Fifth District says in AMERICAN FIRE AND CASUALTY COMPANY v. FINN (181 Fed. (2d) 845).

But, we have a "Liquidated Demand" under Article 4929 of the TEXAS CIVIL STATUTES (Commonly referred to as VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS, 1925, and all Amendments), it reads as follows:

ARTICLE 4929:

> "A fire insurance Policy, in case of total loss by fire of the property of insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy. The provisions of this Article shall not apply to personal property."

This Liquidated demand is supported by the admissions of Joe Reiss, Agent for American Fire and Casualty Company in Houston, while he was under oath on the witness stand during the trial in the District Court of the United States for the Southern District of Texas, at Houston (Tr. 116-123). He testified that he issued the policy for $5000.00 after seeing the house and having an opportunity to see it again as many as 200 times since he saw it the first time.

Argument

Now, we believe his admissions should be considered just as the admissions of the American Fire & Casualty Company, for he was all of the said Company in Houston.

We believe that after the Joe Reiss admissions that all other evidence pertaining to the value of the house and other things such as alleged fraud of Florence C. Finn and her deception in inducing the agent to issue the policy for the amount of $5000.00, should not be considered by this

or any other Court. There could not be fraud where the agent saw the house, because he was not acting on her representations. He had a "look see" himself and was using and exercising his judgment on what he saw and believed. Their contentions relative to this case might be likened to the fellow who pleaded guilty and was sentenced, then came back into Court and asked for a new trial saying, yes, I did plead guilty, but there were many lies told by the witnesses, etc.

This Court may say that this is a foolish comparison—so it is—but isn't their whole position on that point just as silly? We believe, and have a right to believe, that all that they are wanting is a new trial, and are "going all around by their elbow to get to their mouth", as it were.

But, the admissions of Joe Reiss will live so long as the Court Record does and will prevent his Company from obtaining any relief from the terms and conditions of the policy it issued to Florence C. Finn in the amount of $5000.00, and the Liquidated Demand under said Article 4929 of TEXAS STATUTES.

May we cite other undisputed evidence that the house in question was a total loss after the fire:

The Honorable Ben H. Rice, Trial Judge, after Joe Reiss had finished his testimony, made the observation: "The value of the house now, counsel, would not be material, and the value of the lot would have no materiality in this law suit" (Tr. 64).

Miss Florence C. Finn testified that "it burned completely down" (Tr. 46). "It was a total loss" (Tr. 46).

George B. Waters (Tr. 82), testified, by deposition, in answer to the question: "Do you know whether or not the house was completely destroyed or not"? A. "It was a total loss."

This testimony was not disputed.

* * *

We believe we come under the what is known and commonly called a Frivolous Appeal for which we are entitled to a 10% penalty as against the Insurance Carrier.

Petitioners have presented their contentions in their brief and we shall try to answer them as presented, briefly without restating them.

Questions Presented

We admit that is correctly stated.

Statutes Involved

We admit that is correctly stated under the Sub-divisions (a), (b) and "c" of said Section 1441. But we come in under Sub-division (c) which reads:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its jurisdiction."

Argument

Now, we place emphasis upon the words used, it says the District Court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its jurisdiction. You will notice that it has the right to determine all issues therein, or in its discretion, may remand all matters not otherwise within its "jurisdiction." We have

never heard of trying, before, to make any Judge of a Court do or undo anything he has done within his discretion.

In our case it is clear that the District Court did just what he was given the power to do under 1441(c); it tried the case and determined all issues after it was removed to the District Court. We believe this Honorable Court ought to stop this case right here and declare and hold that the District Court was acting well within its discretion and that no other has the power to undertake to curb what he has done while acting according to his discretion as given by law.

Then after so holding, which this Court ought to do, it ought to dismiss petitioner's case from the Docket of the Supreme Court in its entirety from its very inception. "Petition for Writ of Certiorari" and all that has followed in its wake.

We do not believe that this Honorable Court can do otherwise and uphold the dignity of its inferior Courts and sustain them in their powers and discretions given them by law. We believe that no Court should undertake to deprive another Court of its discretionary powers, for if that is done you have destroyed the secure feelings he should have in using it.

Of course, we know if a court abuses its discretion or exercises its greater powers in regard to the thing it does than the law gives to it, then it may be corrected, but when it has not been accused of any violations of its discretionary power or powers given by law, it ought to be protected and its dignity upheld, and, we believe that should be done in this case.

Cases Cited by Petitioner

They have cited several cases in support of their contentions and we have read them all and find no one of them that approaches this case by comparison or parallel. I would not want to accuse any one of petitioners of not knowing what they are trying to do in the present case, but, I do show that they are not consistent folks, and cite what the Trial Court quoted to them out of their own brief that was presented to it when they had filed a motion to remand to State Court after Judgment was entered, the Court, quoting from their brief given in support of their contentions on the motion (Tr. reprint, 179-180), filed December 17, 1948. I believe the Court will better understand petitioner's inconsistency if you read it for yourself. But, for brevity here, we will say that it calls the Court's attention to the fact that we had filed one suit against the American Fire and Casualty Company for $5000.00 on a policy alleged to have been issued to her by said company, the next claim or cause of action is stated against the Indiana Lumbermen's Mutual Insurance Company by alleging the execution of a certain insurance policy setting up the exact date of its issuance and its policy number. "This was done by an alternative pleading in case plaintiff is mistaken as to her allegations against the American Fire and Casualty Company.

The petition, or complaint, then breaks off and there appears a signature line for plaintiff's attorney. The petition then continues with a rambly attempt at a statement of a cause of action against Joe Reiss, doing business as Joe Reiss Insurance Agency. The essence of this cause of action, or complaint, is that Joe Reiss agreed to keep her property insured at all times but negligently failed to do so. *This cause of action is set up in the alternative to the one* stated

against the American Fire and Casualty Company or the Indiana Lumbermen's Mutual Insurance Company."

They said at that time that plaintiff had filed 3 separate causes of action. I believe it will be easy for you to see the difference between what the petitioners said about the pleadings in our case at that time, and what they now say about them. It looks like "hot and cold coming from the same mouth", it was one way in 1948, from what it is in 1950. In the memorandum of the Court at that time he was acting of the defendant's said motion, it went further and said: "The basis of defendants' motion to remand is the claim that BENTLEY v. HALLIBURTON OIL WELL CEMENT CO. (174 S.W. (2d) 492), so requires. I do not think so. There was an action in tort against two joint tort feasors. Here there is not only an action in tort against all defendants, but an action on an alleged contract against each of the other two defendants." That ought to dispose of their contention in that regard. It at least shows that did not stand hitched as to their views then, as compared to now.

Argument

I just simply cannot understand the antics of the plaintiffs. I would not expect the Court to read all of the record in this case, but if you should do so, I do not believe you would wonder at what I have said here. (Three defendants that have very poor memories.)

Petitioners quit the Record of the case and had another one printed, that they call a reprint—we wonder why? But, the difference it makes to us is: that the Index with reference to the pages of the Record we formerly used are not the same, and are not in due order this is confusing since in the old one papers that far to its back part are

moved up towards the front in the new print of the record.

Now, we submit to this Court: That, after Joe Reiss testified as he did all of the testimony of the other witness as to value of the house and all things testified to concerning the money that was spent on the house or paid for it, are of no value in this case in this Court.

May I suggest that you read plaintiff's original petition and then you will know first hand whether it is as petitioners say or what the other Courts say it is.

We are now submitting this weak effort of ours with the sincere belief that we are right and that petitioners are wrong, and Pray that this Honorable Court will hold with us.

Respectfully submitted,

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We have received 3 copies

Nov._____, 1950.

We have agreed that Respondent may file his answer Brief at any time the Court will permit him to do so.